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Case No. 02-484

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM VAN POYCK, *Petitioner*

vs.

MICHAEL M. MOORE, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE ENMUND/TISON FINDINGS ENCOMPASSED IN THE HARMLESS ERROR ANALYSIS THAT WAS CONDUCTED BY ALL THREE LOWER COURTS REQUIRES FURTHER REVIEW BY THIS COURT

II. WHETHER THE STATE COURTS FACTUAL FINDINGS WERE SUPPORTED BY THE RECORD AND THE ENSUING LEGAL DETERMINATION THAT PETITIONER RECEIVED THE EFFECTIVE ASSISTANCE OF COUNSEL WAS A PROPER APPLICATION OF PRECEDENT FROM THIS COURT

III. WHETHER PETITIONER HAS PROPERLY PRESENTED A CLAIM OR RELIEF THAT ENCOMPASSES AN ALLEGED VIOLATION OF FEDERAL CONSTITUTIONAL RIGHT

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OPINION BELOW

The opinions below has been properly reported by petitioner.

CONSTITUTIONAL PROVISIONS

Respondent accepts as accurate Petitioner's statement regarding the applicable constitutional provisions involved.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. § 2254 (a). Section 2254 is the appropriate provision, but petitioner cannot demonstrate that the requirements of same have been met to warrant this Court's review this claim.

STATEMENT OF THE CASE

The respondent accepts petitioner's statement of the case.

STATEMENT OF THE FACTS

Respondent accepts petitioner's statement of the facts to the extent that they represent an accurate account of the facts below. However where respondent disagrees with a particular factual assertion raised by petitioner that point is expressly made in the argument section of this response.

REASONS FOR DENYING THE WRIT

QUESTION I

CERTIORARI REVIEW IS NOT WARRANTED TO REWEIGH OR REEVALUATE THE EXPLICIT FACTUAL FINDINGS MADE BY THE STATE COURTS REGARDING THE ENMUND/TISON STANDARD.

Petitioner claims that certiorari review is warranted in the instant case because his sentence of death is based on an invalid aggravating factor. In reality Van Poyck is attempting to create error where none exists in order to have this Court reweigh the factual findings explicitly found by the state court regarding petitioner's culpability under Enmunds v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987).

Van Poyck highlights the alleged error as follows. In rendering its guilty verdict, the jury submitted a special verdict form which indicated that the jury unanimously found petitioner guilty of felony murder and at least one person also found him guilty of premeditated murder. On direct appeal the Florida Supreme Court determined that there was insufficient evidence to sustain a conviction for premeditated murder.[1] However the court found overwhelming evidence to support a sentence of death based on petitioner's participation in the underlying felonies. Petitioner now claims that the special verdict form is

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[1] The Florida Supreme Court found sufficient evidence to support the first degree murder conviction based on the alternate theory of felony murder. The Court did recognize that the Van Poyck's status as the "non-triggerman would be relevant at the penalty phase. Van Poyck v. State, 564 So. 2d 1066, 1069 (Fla. 1990).

conclusive evidence that at least one if not more of the jurors who had originally determined the Van Poyck was guilty of premeditated murder, relied upon that finding as an "invalid aggravator" during the penalty phase. Petitioner challenges the state court's contrary conclusion.

Fatal to this petition however is the fact that Van Poyck cannot assert that pursuant to 28 U.S.C. section 2254(d) that the state court's ruling "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). See also Williams v. Taylor, 529 U.S. 362 (2000). Petitioner's argument is merely a disagreement regarding the factual conclusions made by the lower courts. Basically petitioner is asking this Court to focus its attention on three isolated facts and ignore the overwhelming facts which support the decisions of the lower courts. However, this Court has previously held that its function on certiorari review is not to reweigh or reassess factual disputes. United States v. Johnston, 268 U.S. 225 (1925); (precluding certiorari to review evidence and discuss specific facts); General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178 (1924)(same). In fact, this Court must presume as correct any factual findings made by state courts. Unless a defendant is able to demonstrate that any such findings are not fairly supported by the record, a federal court is precluded from substituting its factual findings for those of a state court. Marshall v. Loneberger, 459 U.S. 422, 432 (1983)(requiring federal courts to afford state court findings of fact a high degree of deference); Hoag v. New Jersey, 356 U.S. 464, 471 (1958)(ruling that examination of record in state criminal trial by federal court does not include authority to substitute state findings on controverted or fairly debatable factual findings); Thomas v. Arizona, 356 U.S. 390, 402 (1958)(same). A review of the lower courts' decisions, the record on appeal and the relevant case law from this Court establish that certiorari review does not encompass petitioner's request. Certiorari review must be denied.

Second, the trial court's sentencing order contained a "finding" that Van Poyck may have in fact been the individual who pulled the trigger.[2]

Third, because the jury was not instructed at the penalty phase that they should not consider his "triggerman status" as an aggravating factor, it must be assumed that they in fact did so. These circumstances render his sentence invalid and require re-sentencing. Van Poyck's argument is not supported by the record. To the contrary, the record demonstrates that petitioner was sentenced to death based solely on relevant and admissible facts, applicable jury instructions and argument presented at the penalty phase.

The state's main focus at the penalty phase was on Van Poyck's participation in the underlying felonies rather than the triggerman theory. (R2.23.3482-3500, 3507-3512, 3520, 3524-3526, 3537-3539,3562-3565). During the penalty phase the state presented and argued solely for the four statutory aggravating factors that were found by the trial court and upheld by the Florida Supreme Court. (R2.21.3482-3500, 3507-3508). Van Poyck v. State, 564 So. 2d 1066, 1068 (Fla. 1990). At no time did the state ever argue or was the jury was ever instructed on any factor which included the notion that Van Poyck was the "triggerman" In fact, just before the penalty phase, the trial court, with agreement from both sides, made it clear that he would not emphasize either theory of first degree murder:

> THE COURT: Does everybody then agree as to, "Ladies and gentlemen of the jury, you have

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[2] The state would note that based on the special verdict form, it is clear that the jury unanimously determined that petitioner was guilty of felony murder.

found the Defendant guilty of first degree murder," and I leave it at that?

MR. KLEIN: Yes Judge.

THE COURT: Not first degree felony and/or first degree premeditated and not both?

MR. KLEIN: Right.

(R2.21.3183).[3] Additionally the jury was fully instructed on the factors required under Enmunds v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987) to support a sentence of death for a defendant who was not the actual killer. Van Poyck, 564 So. 2d at 1068.

The record totally rebuts Van Poyck's assertion that the state argued that the jury should consider any impermissible aggravating factor. Consequently, Van Poyck's reliance on the fact that some members of the jury found petitioner guilty of premeditation at the guilt phase is not sufficient to overcome the lower courts' factual findings to the contrary.

Similarly Van Poyck's reliance on the judge's sentencing order in support of his claim is again belied by the record. Van Poyck asserts that the judge's recognition that Van Poyck may have been the shooter somehow proves that the trial court found that he was in fact the triggerman. However, a more complete reading of the judge's order reveals the following findings by the court:

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[3] In fact the jury was told by the prosecutor to assume that the co-defendant was the actual shooter when they were considering petitioner's sentence. (R2.21.3511-3512).

> Further the court would note that Mr. Van Poyck is an individual who is quite intelligent and very knowledgeable as to the law and that he himself admits that he was well aware of the law including felony murder, that he himself was the individual who planned this operation who retained Mr. Valdez to assist him and who checked the guns on the way to the location where this murder occurred to see to it that they were loaded. By all the evidence Mr. Van Poyck was a major participant in this murder.

(F-3). The record demonstrates that the judge's focus regarding appellant's moral culpability in the death of Officer Griffis centered on his participation in the underlying felonies. The judge's passing reference to Van Poyck's possible status as the actual shooter was just that, a passing reference.

These un-refuted facts provided the basis for the Florida Supreme Court's findings:

> Although the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and the primary participant in this crime. He and Valdez arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force could be used, we find that the death sentence is proportional.

Van Poyck v. State, 564 So. 2d 1066, 1070-1071 (Fla. 1990).[4]

[4] At the guilt phase, Van Poyck testified that he did not shoot Officer Griffis. However he also stated that he planned the entire

In his federal habeas petition, Van Poyck challenged the Florida Supreme Court's determination that death was the appropriate penalty irrespective of the fact that he was not the shooter. The district court denied relief finding that the death sentence was independently supported by the jury's unanimous verdict of felony murder. (R2.37.19). Further review of the state court's determination by the Eleventh Circuit also resulted in a finding that there was a sufficient basis for imposition of the death penalty based on felony murder. Van Poyck v. Moore, 290 F.3d 1318, 1329 (11th Cir. 2002).

The appellate court also found ample support in the record to refute petitioner's claim that the jury and judge relied upon an invalid aggravating factor, i.e., that he was the triggerman, in support of a finding of death. The appellate court found:

> We have no good reason to think that the jury relied on something more than the factually supported theory of felony murder. Petitioner points to the jury's verdict form from the guilt phase of the trial, which indicates that at least one--but not all--of the jurors would have convicted Petitioner on the basis of premeditated murder. The question, however, is what the jury considered at the penalty phase of the trial.
>
> In deciding this question, it seems useful to look at the closing arguments made during the penalty phase. As discussed above, whether Petitioner

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escape operation, he recruited his co-defendant Valdes to assist him, and he admitted that Officer Griffis would still be alive if not for Van Poyck's actions. Van Poyck v. State, 564 So. 2d 1066, 1068 (Fla. 1990).

was actually the triggerman was of only minimal importance during the prosecutor's closing. Never did the prosecutor argue triggerman status as an aggravating factor that would justify the death penalty. And, in rebutting Petitioner's argument that Petitioner's minor role in the crime should be considered a mitigating factor, the prosecutor focused chiefly on Petitioner's role in orchestrating and planning the crime, not on whether Petitioner was the triggerman. The prosecutor's expressed argument was that Petitioner deserved death whether or not Petitioner was the triggerman.

Petitioner also argues that the trial court improperly relied upon his being the triggerman. Again, the Florida Supreme Court's rejection of these claims was not unreasonable.

The sole indicator that the trial court considered Petitioner to be the triggerman is a passage in the order imposing the death penalty, in which the trial court stated, "the State clearly presented competent and substantial evidence as to the crime of first degree felony murder and/or first degree pre-meditated murder and in reality presented competent evidence that [Petitioner] may have in fact been the individual who pulled the trigger and shot Fred Griffis." The trial court never stated that it found Petitioner, in fact, to have been the triggerman or that the court considered Petitioner's triggerman status to be an aggravating factor justifying the death penalty. The only aggravating factors the trial court found to exist were the four argued by the prosecutor in

> his closing, and none of those factors is based upon triggerman status.

Van Poyck, 290 F.3d at 1329-1330. Based on the record recounted above, it is illogical to assume that the jury relied upon any impermissible factors at the penalty phase. Petitioner has not presented this Court with any legal reason to overcome the presumption of correctness attached the state court findings. The state never proceeded under an unconstitutional alternate theory at either the guilt or penalty phase. The state supreme court, the district court and the appellate court were correct in their analysis that irrespective of a finding of premeditation by less than a majority of the jurors at the guilt phase, there was overwhelming evidence to support the penalty phase theory that Van Poyck was a major participant in this crime. Van Poyck's speculation and presumption regarding the judge's and jury's findings are impermissible. Accordingly, Van Poyck's request for further review must be rejected. Cf. Griffin v. United States, 502 U.S.6 (1991) (ruling that there is no violation of due process when a trial court instructs a jury on two different legal theories where one was supported by the evidence and the other was not); Schad v. Arizona,501 U.S.24(1991)(same); see also Sochor v. Florida, 504 U.S. 527 (1992), (affirming that harmless error analysis is permissible at penalty phase when error is based on insufficient evidence because, "although a jury is unlikely to disregard theory flawed in law, it is indeed likely to disregard an option simply unsupported by evidence."). See Bush v. Singletary, 988 F.2d 1082, 1092 (11th Cir. 1993)(finding sufficient evidence to support Enmund/Tison findings as defendant himself admitted that he knew what he was doing throughout the commission of the offenses).

QUESTION II

THE FACTUAL FINDINGS MADE BY THE STATE COURTS ARE SUPPORTED BY THE RECORD AND PROPERLY FORMED THE BASIS FOR A DETERMINATION THAT TRIAL COUNSEL PROVIDED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE

Petitioner claims that he was denied the effective assistance of counsel during the penalty phase of his trial as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In support of his allegations, he relies on Strickland v. Washington 466 U.S. 668 (1984) and Williams v. Taylor, 529 U.S. 362 (2000) asserting that the courts below did not follow the dictates of this Court regarding the legal analysis for a claim of ineffective assistance of counsel. In reality, petitioner is asking this Court to substitute his versions of the facts in place of those made by the state courts. However a review of the state courts factual findings resolving this issue along with the review conducted by the Eleventh Circuit Court of Appeals demonstrates that Van Poyck is asking this Court to engage in an exercise that is contrary to law and precedent from this Court. United States v. Johnston, 268 U.S. 225 (1925); (precluding certiorari to review evidence and discuss specific facts); General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178 (1924)(same). In fact, this Court must presume as correct any factual findings made by state courts. Unless a defendant is able to demonstrate that any such findings are not fairly supported by the record, a federal court is precluded from substituting its factual findings for those of a state court. Marshall v. Loneberger, 459 U.S. 422, 432 (1983)(requiring federal courts to afford state court findings of fact a high degree of deference); Hoag v. New Jersey, 356 U.S. 464, 471 (1958)(ruling that examination of record in state criminal trial by

federal court does not include authority to substitute state findings on controverted or fairly debatable factual findings); Thomas v. Arizona, 356 U.S. 390, 402 (1958)(same). See also 28 U.S.C. Section 2254(d). A brief review of the state court's factual findings will demonstrate that they are supported by the record and properly from the basis for the lower courts' legal determinations.

In this petition, Van Poyck asks this Court to find that trial counsel did not begin to investigate for the penalty phase until after the jury rendered a guilty verdict; and this lack of effort on the part of counsel resulted in presentation of penalty phase evidence that was neither complete nor the result of any strategic decisions or investigation. However the record fully supports the factual findings made to the contrary by the state courts.

In denying petitioner's claim that counsel was ineffective at the penalty phase for failing to present mental health mitigation as well as a more detailed account of his childhood, the Florida Supreme Court stated:

> This extended excerpt demonstrates that Klein had quite adequate reasons for limiting his use of the prison records and thereby limiting the presentation of Van Poyck's mental-health history. Further, Klein testified that Dr. Villalobos, after examining Van Poyck prior to the penalty phase, reported that Van Poyck was a sociopath. Indeed, Klein testified that Dr. Villalobos asked not to be called as a witness because his findings would not be helpful. This information only strengthens Klein's tactical choice.

Van Poyck, 694 So. 2d at 692. With respect to trial counsel's investigation into family and childhood background the court further found:

> As to Klein's choices regarding the presentation of Van Poyck's life history during the penalty-phase proceeding, we likewise find no error. Evidence of Van Poyck's life history was adequately presented by Klein at the penalty-phase proceeding. (FN1) Indeed, the jury was actually aware of most aspects of Van Poyck's life that he now argues should have been presented.

Van Poyck, 694 So.2d at 692. The record supports these findings. Trial counsel Carey Klein testified that the possibility of establishing mental health mitigating evidence for the penalty phase was discussed from the beginning of his representation. (R.2.29.906,920). Klein requested petitioner's Department of Corrections records "fairly early on in the representation," and received these records sometime by late fall or winter. (R.2.29.921). Klein explained that these records were crucial in light of the fact that appellant was in prison from the time he was seventeen until six months before Officer Griffis was murdered. (R.2.29.921). Klein obtained the services of a mental health professional Dr. Villalobos and had him review the extensive prison files. (R.2.29.937). The doctor asked that psychological testing be done. (R.2.29.937, 1053). Klein was hoping to find evidence to establish both mental health mitigation and model prison behavior. (R.2.29. 1064). Due to scheduling problems, however, the tests were not done until the day before the penalty phase. (R.2.29.941-942, 1062). In spite of the fact that Klein operated under the mis-assumption that he would have more time between the guilty and penalty phases, in which to prepare for the penalty phase, Villalobos stated that he had nothing helpful to say about Van Poyck at a penalty phase hearing. Villalobos told

Klein that he did not like the tests results, he concluded that appellant was a sociopath and that, he was not crazy or incompetent to stand trial, and there was no evidence of organic brain syndrome. (R.2.29 1065, 1091-1093). Given all of this information, Klein asked the doctor not to write a report. (R.2.29.1093, 1106)

Klein decided that he could not present a mental health defense since Dr. Villalobos could not offer any evidence to support such a defense[5] and presentation of any such "evidence" would have opened the door to extremely damaging rebuttal evidence. That evidence included: Van Poyck was serving a life sentence for armed robbery, he had an extensive juvenile record,[6] twenty-six disciplinary reports for fighting, weapons offenses; escape attempts during his admission to state mental hospital, illicit drug use and a prophetic assertion that he would kill a prison guard some day.

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[5] In addition to the lack of any corroborative evidence to support a mental health defense, Van Poyck admitted that he faked mental illness in prison in order to attempt an escape from the hospital. (R.2.29.930-933, 941-943 584, 637). Klein would have been ethically precluded from asserting a false affirmative defense. Van Poyck, 694 So. 2d at 695. See also Davis v. Singletary, 119 F.3d 1471 (11th Cir. 1997); Williams v. Kemp, 846 F. 2d 1276, 1281 (11th Cir. 1988); Freund v. Butterworth, 165 F.3d 839 (11th Cir. 1998)(en banc).

[6] Petitioner claims that trial counsel should have introduced his juvenile records from the Okeechobee school for boys, in an effort to establish that he was abused at the facility. However, petitioner failed to present any evidence to establish that he was abused. Additionally, the jury would have heard evidence that appellant was placed there because of his extensive juvenile record which included ten prior convictions for breaking and entering, possession of stolen properly and auto theft. (R.2.28.120-122).

With regard to the investigation into appellant's family background, Klein testified that he maintained extensive contact with Van Poyck and they spent much of that time speaking about the penalty phase. (R.2.29.917, 963, 1051, 1058,1105). "I asked him who I could contact, who I could call, who were your friends when you were kids? I didn't have any. Tell me about your family. Well, the only one still in contact is my stepmother and my brother, so on and so forth." Klein made contact with Lee Van Poyck, appellant's step-mother, and Jeff Van Poyck, appellant's brother. (R.2.29.953,963). Klein further stated that on a number of occasions, he specifically discussed with Van Poyck whether he had ever been physically abused as a child. (R.2.29.60). Appellant repeatedly denied those claims. (R.2.29.960).

Based on his discussions with the appellant and family members Klein presented penalty phase evidence which provided a view into Van Poyck's world as a young boy, from people who had actual first-hand knowledge of his family circumstances. The only people who were in that house on a daily basis and were available to tell about it were Jeff Van Poyck, appellant's brother, Lee Van Poyck, appellant's step-mother, and Van Poyck, himself. In addition, his aunt, who during one point was a frequent visitor to the Van Poyck home also testified about Van Poyck's childhood. The presentation included a description of appellant's withdrawn father, the fact that appellant tragically lost his mother in a freak accident at a young age and that appellant endured abusive, undesirable, and even mentally unstable caretakers. Van Poyck v. State, 564 So.2d 1066, 1068 (Fla. 1990). Klein also demonstrated that Petitioner did not have a choice but to turn to a life of crime based on the overbearing influence of his much older brother Jeff. In fact, all the Van Poyck children experienced behavior/emotional problems. (R.2.29.961-965, R.2.21.3253-3450). In addition, Klein argued that Van Poyck was emotionally neglected by his father growing up, particularly after the loss of his mother. And Klein pointed out to the jury

that the entire motivation of the escape attempt was to free his friend O'Brien, who had been a substantial dominating force in this offense. (R.2.21.3545-3574). In light of everything presented, it is apparent that much of what petitioner now claims is important mitigating evidence was presented to the jury for consideration through the testimony of Jeff Van Poyck, Lee Van Poyck, Anne Van Poyck and Van Poyck, himself and is therefore cumulative.

Based on the record, the Florida Supreme Court determined that Klein did not render inadequate performance in presenting Van Poyck's life history since "the jury was actually aware of most aspects of Van Poyck's life that he now argues should have been presented." Id. at 692. Consistent with those findings, the district court observed that trial counsel was able to present much of this information while avoiding the presentation of any negative information. (R.2.37-7).

Based on the Florida Supreme Court's findings, the Eleventh Circuit stated:

> Petitioner cannot prevail on these claims. The Florida Supreme Court determined that Counsel "had clear tactical reasons" for not presenting mental health evidence. See Van Poyck II, 694 So.2d at 692. That determination and the conclusion that Counsel's performance therefore was not deficient are not unreasonable.
>
> During a post-conviction evidentiary hearing, Counsel identified a number of reasons for not arguing Petitioner's mental health as a mitigating factor. First, Petitioner had spent most of his adult life in prison; and most evidence of Petitioner's mental health would have been based upon prison records. Counsel concluded that the

> use of such records would have opened the door to a considerable amount of damaging evidence: many disciplinary reports, weapons offenses, and escape attempts. Second, in discussions between Petitioner and Counsel before trial, Petitioner claimed to have faked many of the episodes that led to his being sent to the Florida mental hospital.

Van Poyck v. Moore, 290 F.3d 1318, 1323 (11th Cir. 2002).

In reviewing that portion of the claim regarding trial counsel's presentation of family background mitigation, the Circuit Court stated:

> In resolving this issue, the Florida Supreme Court concluded that "[e]vidence of [Petitioner's] life history was adequately
> presented by [Counsel]." Van Poyck II, 694 So.2d at 692. We accept that conclusion and the findings that support it; they are reasonable.
>
> During the post-conviction evidentiary hearing, Counsel testified that he and Petitioner had discussed the penalty phase and the presentation of mitigating evidence "constantly." At the penalty phase hearing itself, Counsel called five witnesses. These witnesses testified to much of what Petitioner now claims Counsel failed to show the jury.
>
> At trial, Jeff Van Poyck, Petitioner's brother, testified to their mother's early death, abuse from the housekeeper, and the strict discipline imposed by their stepmother. He also testified about how he had involved Petitioner in crime and in alcohol

> use at an early age. Petitioner's stepmother testified to the mental instability of Aunt Phyllis and to the negative influence Jeff had over Petitioner. Another aunt also testified to the mental instability of Aunt Phyllis. Finally, Counsel called a nurse who had met Petitioner while he was in prison. She testified that Van Poyck was a caring and friendly person and that he had expressed remorse over the death of Officer Griffis. Petitioner also testified on his own behalf. He testified to his close relationship with O'Brien, his educational pursuits in prison, and his regret of the death of Officer Griffis.

Van Poyck, 290 F. 3d at 1323-1324.

In summary, the state court's factual findings are supported by the record and petitioner cannot overcome the presumption of correctness attached to them. Without any factual support for his claim that counsel was ineffective, there is no basis for review by this Court.[7]

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[7] To the extent petitioner is also claiming that the Eleventh Circuit unreasonably applied precedent from this Court, the opinion of the circuit court demonstrates otherwise. It is clear that trial counsel had significant contact with petitioner and that many of the strategic decisions employed were the results of those contracts. Such actions are reasonable, and are properly relied upon by courts in the analysis. Strickland v.Washington, 466 U.S. 668, (1984)("[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant.") Additionally, a counsel's decision to forgo a mental health presentation may be considered sound strategy if it will lead to the admission of negative information. Again the lower courts decision to rely on such testimony in the instant case was also in consistent with precedent form this Court. See Berger v. Kemp, 483

Based on the factual findings and sound reasoned judgement of the lower courts, certiorari review is not warranted.

QUESTION III

REVIEW IN THIS COURT IS NOT WARRANTED BECAUSE PETITIONER HAS FAILED TO PRESENT THIS COURT WITH A FEDERAL CONSTITUTIONAL VIOLATION; AND THE LOWER COURTS DENIED CORRECTLY APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AS THE RECORD UNEQUIVOCALLY SUPPORTS THE FACTUAL FINDINGS THEREFORE FURTHER REVIEW IS NOT WARRANTED

Petitioner's challenge to the Florida Supreme Court's and Eleventh Circuit's opinions is not directed towards any legitimate analysis of the substantive issue. In fact petitioner's "complaint" does not involve a violation of any federal constitutional rights. Certiorari review is not warranted.

The issue developed in the state courts as follows. On direct appeal, the state supreme court held that the two jurors challenged in the initial brief was a moot point because neither juror sat. Van Poyck v. State 564 So. 2d. 1066, 1071. (Fla. 1990)(emphasis added). Those jurors were Bruschi and Abefarmis. In dicta the court noted that the two jurors were pro-death and should have been excused for cause.

In his habeas petition to the Florida Supreme Court, petitioner claimed that appellate counsel had been ineffective

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U.S. 776, 793 (1987).

because he should have named two other jurors, i.e., jurors who actually sat on the jury. Petitioner further argued that the two jurors who actually did sit, Moody and Bradford, were as objectionable as Bruschi and Abefarmis. Therefore, since the Court had already stated in dicta that Bruschi and Abefarmis should have been excluded for cause, so too should have Moody and Bradford.

The state supreme court disagreed and found, the following:

> He claims that because the voir dire testimonies of these jurors are indistinguishable in content from the voir dire of various venirepersons whom his appellate counsel should have named, this Court would have found reversible error in the denial of the for-cause challenges and in the denial of his request for an additional peremptory challenge had he received effective assistance of counsel on appeal. We have reexamined the voir dire of the jurors who were challenged for cause and were the subject of a claim in the initial appeal. In their voir dire, they each unequivocally indicated that they would abide by the trial court's instructions and would recommend a life sentence if the mitigating circumstances outweighed the aggravating circumstances. (FN5) Since they were excused for personal reasons and Van Poyck did not have to exercise a peremptory challenge, the grounds for their excusal for cause was a non-issue in the initial appeal. On a reexamination of the record, we also find that the trial judge properly exercised his discretion in denying the challenge for cause to each of these jurors.

Van Poyck v. Singletary 715 So.2d 930, 934 (Fla. 1998). Without citing to any precedent from this Court, Van Poyck claims that he was entitled to rely on the court's dicta on direct appeal in 1990 as a basis for relief in a state habeas petition in 1998.

The Eleventh Circuit disagreed and noted that any discussion regarding the fitness of those two juror was simply dicta and the "law of the case" doctrine was not applicable. Therefore Van Poyck's "complaint" against the court's "flip-flop" decision was without merit. Van Poyck v. Moore, 290 F.3d 1318, 1330 n.12 (11th Cir. 2002). Because petitioner has not stated a basis for federal relief, review must be denied.

Irrespective of petitioner's failure to properly present a federal question for review in this Court, the lower courts properly concluded that appellate counsel did not render ineffective assistance. Had appellate counsel presented a challenge to both Moody and Bradford on appeal as Van Poyck contends, relief would still have been denied.[8] Both jurors stated that, although they were in favor of the death penalty, neither would automatically vote for it. Ms. Moody never expressed any difficulty in being able to render a fair and impartial verdict. She

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[8] The state would note that fatal to any challenge regarding juror Bradford, is the fact that her competency was not preserved for appeal. Van Poyck, 715 So.2d at 931, n.3. Consequently, appellate counsel could not be ineffective for failing to pursue an unpreserved issue. Jackson v. Dugger, 931 F.2d 712, 715 (11th Cir. 1991); Bertolotti v. Dugger, 883 F.2d 1503, 1523 (11th Cird. 1989); see also Groover v. Singletary, 656 So.2d 424 (Fla. 1995); Ferguson v. Singletary, 632 So.2d 53, 58 (Fla. 1993); Medina v. Dugger, 586 So.2d 317, 318 (Fla. 1991); cf. Jones v. Barnes, 463 U.S. 745, 751-753 (1983)(finding that effective appellate counsel is not required to raise every conceivable issue).

stated that she would not prejudge the case, but rather would decide the case based on the evidence presented. (R.2.18.509). She consistently and unequivocally stated that she would follow the law and would not automatically recommend the death penalty.[9] (R.2.18.511-514). Likewise, Ms. Bradford stated that she had no preconceived notion of guilt; the case should be tried in the courtroom and not in the media. (R.2.18.866). She also indicated that her opinion about the appropriateness of the death penalty depended on the facts of the case and although she favored the death penalty she would not automatically recommend death.[10] (R.2.18.871). When reviewing this record the Eleventh Circuit noted:

> It is true that many of the challenged jurors expressed strong support for the death penalty; and some even initially suggested that, for certain crimes, they thought they would always return a death recommendation. Each juror, however, upon being instructed by the trial court on the law of Florida, not only said that he or she could be fair and follow the law, but also stated that he or she could return a life imprisonment recommendation if the facts and the law warranted it. In addition, each juror indicated, in response to questioning by the prosecution, that it would not be fair to defendants if juries returned

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[9] Trial counsel did not challenge Ms. Moody for cause at the time she gave her responses. It was not until Van Poyck used all of his available peremptory strikes that he mentioned Moody as someone wanted to remove for cause or peremptorily.

[10] Trial counsel did not use an available peremptory strike to remove Bradford at the time she gave her responses, nor did he identify Bradford as someone he would strike if he were given an additional peremptory challenge.

> a death recommendation in every case. We are aware of no Supreme Court case, and Petitioner has cited none, that has held that such a fact pattern requires reversal. And, we do not consider the Florida Supreme Court's conclusion to have been an unreasonable application of Morgan or any other Supreme Court case decided before the Florida Supreme Court's decision.

Van Poyck, 290 F.3 at 1328-1329. Both jurors expressed unequivocal assertions that they would follow their oath as jurors and decide this case strictly on the evidence presented. The law requires no more. See Wainwright v. Witt, 469 U.S. 421, 424 (1985). Therefore, appellate counsel was not ineffective for failing to question the competency of either juror Moody or Bradford. The record supports the factual and legal conclusions of the lower courts. See Jones v. Barnes, 463 U.S. 745, 751-752 (1983)(rejecting argument that an appellate counsel must raise every non-frivolous issue on appeal, "[experienced advocates sine time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Certiorari review must be denied.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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